JD–108–98
Salem, OH

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
DIVISION OF JUDGES

FRESH MARK, INC., d/b/a
CARRIAGE HILL FOODS

and

Cases 8–CA–27078
8–CA–27199
8–CA–27324

UNITED FOOD AND COMMERCIAL
WORKERS UNION, LOCAL 880,
AFL–CIO, CLC

Mark F. Neubecker, Esq., for the
General Counsel.
Michael Shershin, Esq. (Constangy, Brooks & Smith, L.L.C.), of Atlanta, Georgia, for the Respondent.
Anthony P. Sgambati II, Esq. (Green, Haines, Sgambati, Murphy & Macala Co., L.P.A.), of Youngstown, Ohio, for the Charging Party.

SUPPLEMENTAL DECISION

EARL E. SHAMWELL, JR., Administrative Law Judge. The National Labor Relations Board (the Board) in *Carriage Hill Foods*, 322 NLRB 127 (1996), issued a Decision and Order finding, inter alia, that the Respondent violated Section 8(a)(3) and (1) of the National Labor Relations Act (the Act) by terminating employees Barbara Fryman and Wyman Davis. The Board ordered that the Respondent offer both Fryman and Davis full reinstatement to their former jobs and make them whole for any loss of earnings or other benefits suffered as a result of their unlawful terminations, less any interim earnings, plus interest.

The parties being unable to agree on the amount of backpay due according to the Board's Order, the Acting Regional Director for Region 8 issued a backpay specification for Fryman and Davis on June 30, 1997.

The Respondent and the General Counsel have entered into a stipulation whereby the Respondent waived its rights to appeal the Board's decision in the underlying case to the circuit court of appeals and agreed to resolve the backpay issues for Fryman and Davis in a compliance proceeding.[1]

The compliance phase of the case was tried before me in Cleveland, Ohio, on November 5, 6, and 7, 1997, based on the aforementioned compliance specification. As amended at the hearing, the specification asserts that the Respondent owes Fryman a total of

[1] G.C. Exh. 1(d).

$56,711, including interest,[2] and owes Davis $35,318 in net backpay, including interest. The parties reached agreement with respect to the backpay entitlements due Davis and, therefore, the primary dispute to be resolved lies in a determination of only Fryman's backpay.[3]

The Respondent filed a timely answer to the specification which contests the amount due Fryman and asserts a number of defenses.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs of the General Counsel, counsel for the United Food and Commercial Workers Union, Local 880 (the Charging Party or Union), and the Respondent, I make the following.

Findings of Fact

A. *Background*

Barbara Fryman began working for the Respondent on September 12, 1985, and was continuously in its employ until her unlawful discharge on January 10, 1995; her specific job at the time of her discharge was second (afternoon) shift saw operator-sorter assigned to the microwave bacon department.[4] During Fryman's tenure with the Respondent, she volunteered on a regular and frequent basis for overtime work in a number of departments outside of her regular assignment, as well as within it. Because of her seniority and her willingness to work overtime, she customarily worked significant amounts of overtime in any given period. In fact, Fryman volunteered for overtime assiduously and worked overtime seemingly whenever it was available to her throughout the plant.[5] On this record, I am convinced that Fryman was clearly possessed of an exceptionally strong and enduring work ethic.

B. *The Specification*

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[2] The General Counsel amended the original specification (G.C. Exh. 1(b)) at the hearing. The amendment resulted in a downward revision of the total amount (including interest) due Fryman; to wit, net backpay went from $50,407 plus $6,549 in interest to $48,895 plus $7,816 in interest. (See G.C. Exh. 2.)

[3] After the hearing was convened on November 6, 1997, with regard to Davis' claim, the parties reached an installment settlement agreement (Settlement Agreement) which was executed formally on November 11, 1997. The General Counsel submitted a motion to me on April 28, 1998, requesting approval to withdraw that part of the amended specification relating to Davis' claims as the terms of the parties' settlement agreement had been fulfilled. I approved the proposed settlement on the record on November 6, 1997, and in view of the aforementioned motion to withdraw that part of the specification relating to Davis, his part in this matter hereby is closed.

[4] Fryman was employed at the Respondent's Salem facility which had been in operation for approximately 10 years at the time of her discharge. Seniority at the plant is generally determinable by reference to the employees' "clock card" number, e.g., the most senior employee's clock number would be "1." (Tr. 149.) Fryman's clock card number was 266. (G.C. Exh. 4.)

[5] Hourly workers like Fryman are eligible to work in various departments. Over the years, Fryman worked in about seven or more of these different departments in addition to the microwave bacon department where, before her discharge, she worked on almost a daily overtime basis for 15 to 30 minutes, trucking bacon to the cooling area.

In essence, the specification (as amended) states that the backpay period for Fryman commenced on January 11, 1995, the day after her unlawful discharge, and ended on November 18, 1996, when an offer of employment was made to and accepted by her. The specification asserts that the appropriate measure of gross backpay for earnings Fryman would have made but for her discharge during the backpay period is the sum of her straight time hours, overtime pay at time and a half and double time, attendance bonuses, gainsharing (program) participation, quarterly lump-sum bonuses, flex plan benefits, the defined contribution retirement plan, (the Respondent's) employee savings plan benefits, and (paid) vacation, had she been continually employed in her last position.[6] The specification further asserts that regarding Fryman's calendar quarter net interim earnings, this amount is the difference between her calendar quarter gross interim earnings and her calendar quarter interim expenses (here only automobile mileage); and that Fryman's quarterly net backpay is the difference between calendar quarter gross backpay and calendar quarter net interim earnings. Finally, the total net backpay due Fryman is the sum of the calendar quarter amounts of net backpay.

1. Respondent's answer to the specification[7]

While acknowledging that some amount of backpay is due Fryman, the Respondent takes issue with the General Counsel's calculations in certain parts of the specification. The Respondent specifically contests calculations relating to amounts allegedly due Fryman pursuant to the attendance program, gainsharing savings plan, vacation pay, straight time hours, and overtime.[8] However, it should be noted that it is with respect to the amount of overtime (time and a half and double time) used by the General Counsel that the Respondent perhaps takes greatest and perhaps sole issue and disagreement. The Respondent also contends by way of an affirmative defense that Fryman failed to mitigate her damages.

The Respondent both in its answer (and brief) does not seriously contest Fryman's interim work submissions or the General Counsel's determinations regarding these in the specification; nor does it challenge the interest rates utilized by the General Counsel for each

[6] The parties do not dispute the backpay period or the components of the specification. It was agreed by the parties that the Respondent's lump-sum program was discontinued on June 5, 1995, and that Fryman is entitled to $145. The parties also have stipulated and agreed that Fryman's initial pay rate of $9.82 per hour was increased to $10.17 per hour on June 5, 1995, and then to $10.42 per hour on June 3, 1996; that Fryman is due $304 in disability pay for the first quarter of 1996 and $2,394 for the second quarter of 1996 because of pregnancy for the period March 20 through June 25, 1996; that Fryman is entitled to $200 as a retirement contribution from the Respondent for 1995 and that she received the contribution for 1996; and that Fryman's attendance bonus is $122 for the first quarter of 1996 and $125 for the second quarter of 1996.

[7] As noted, the General Counsel was allowed to amend the original specification at the beginning of the hearing. I, in turn, allowed the Respondent to answer the amendment orally with the understanding that unless otherwise stipulated and agreed, I would consider the Respondent's answer to the amendments to be in conformance with its answers to the original specifications. Therefore, I have assumed that when the Respondent disagreed with (denied) the specifications as originally set forth, its response to the amendments would be identical.

[8] Respondent's answer (G.C. Exh. 1(e)) included an attachment (No. 2) which sets out in the various categories covered by the specification the amounts to which the Respondent believes Fryman is entitled before inclusion of Fryman's anticipated interim earnings (and expenses).

applicable quarter. Also, the Respondent does not contest Fryman's claimed expenses, that is her automobile mileage.

2. The Rationale of the specification

The General Counsel called Norma Sharp, a compliance officer assigned to the Board's Region 8, to testify in support of the compliance specification for Fryman.[9]

Sharp prepared the backpay specification for Fryman mainly from information provided by the Respondent, including conferences with management, payroll and other financial data, the employee handbook, and personnel records of Fryman and other company employees. Sharp also conferred with Fryman and required her to complete and submit regularly search-for-work forms; Fryman's interim employers were also consulted. Armed with this information, Sharp considered three formulas utilized by her in the past to calculate an employee's backpay and determined that a previous (prior to unfair labor practice) work record formula was most suitable for Fryman because of her long work history with the Respondent. According to Sharp, in utilizing this formula, normally she analyzed the discriminatees' work history 1 to 2 years before termination to derive a representative idea or profile of the employees in terms of their work habits, raises, and available benefits.[10] In Fryman's case, among other things, Sharp determined that in the 2 years prior to her termination — 1993 and 1994 — she worked a great deal of overtime and in all likelihood, had she not been terminated, Fryman would have continued to work a similar amount of overtime. To determine what overtime Fryman might reasonably have worked, Sharp considered that the Respondent offered both double time (twice the employees' normal hourly rate) and time and half (one and one-half the hourly rate) to its hourly employees like Fryman. Sharp then averaged Fryman's 1993 and 1994 work record in these overtime categories per quarter of the backpay period to arrive at the calculations contained in the specification. Additionally, Sharp consulted with Fryman herself regarding the overtime. Fryman advised Sharp that she worked more overtime than most workers because she sought not only work outside of her assigned department but also was willing to (and did) work) any overtime that was available to her on a regular basis. Sharp thus concluded that the overtime she attributed to Fryman in the specification was reasonable and in fact reflected fairly accurately what Fryman probably would have worked had she been retained by the Respondent during the backpay period.

[9] Compliance Officer Sharp's fairly extensive background and experience in Board-related compliance matters, including preparing official backpay specifications, was not questioned by the Respondent. I would conclude, based on her testimony, that she is expert at and with respect to compliance matters.

[10] Sharp rejected the representative complement of current employees (employees similar to the discriminatee) formula and the replacement grouping (where employer actually has hired someone to do the discriminatee's work) formula because as to the former, upon review of pertinent personnel records, the sample of employees provided by the Respondent, Sharp determined that they worked for less overtime than Fryman prior to the discharge; and the latter formula she determined was simply not applicable to Fryman's case.

C. *Applicable Legal Principles*

The Board has established well-settled principles governing the resolution of backpay disputes through its own and court proceedings.

Generally, where an unfair labor practice has been found, some backpay is presumptively owed by the offending employer in a backpay proceeding. *La Favorita, Inc.*, 313 NLRB 902 (1994), enfd. 48 F.3d 1231 (10th Cir. 1995).

The General Counsel's burden is to demonstrate the gross amount of backpay due, that is what amount the employee would have received but for the employer's illegal conduct. The General Counsel, in demonstrating gross amounts owed, need not show an exact amount; an approximate amount is sufficient. *Laborers Local 158 (Worthy Bros.)*, 301 NLRB 35 (1992). Thus, it is well established that any formula which approximates what the discriminatee would have earned absent the discrimination is acceptable if it is not unreasonable or arbitrary under the circumstances. *Am Del Co., Inc.*, 234 NLRB 1040 (1978), *Frank Mascali Construction*, 289 NLRB 1155 (1988). The Court and the Board have held that any doubts and uncertainties regarding the resolution of the backpay issue must be resolved in the favor of the discriminatee and against the wrongdoing employer. *United Aircraft Corp.*, 204 NLRB 1068 (1973). Once this has been established, the employer must then demonstrate facts that would mitigate the claimed backpay liability.

The employer must, by a preponderance of the evidence, establish and clarify any such uncertainties. *Metcalf Excavating*, 282 NLRB 92 (1986).

D. *The Overtime Issue*

1. Preliminary statements and analysis

The Respondent disagrees with the General Counsel's rationale and determinations regarding Fryman's overtime.[11] The overtime dispute between the parties is perhaps the driving force of the instant backpay controversy. Therefore, as a preliminary matter, it is useful to examine the specification as compared with the Respondent's answer with specific reference to the overtime component.

As a start, a comparison of the General Counsel's amended specification, the Respondent's answer, and stipulated adjustments, but excluding the discriminatee's interim earnings, expenses, and interest reveals the following respective gross backpay determinations as calculated by the parties.

[11] Overtime includes both double time — Fryman's hourly wages doubled — and time and a half — Fryman's straight time hourly rate plus one half of that rate. For purposes here, double time sometimes will be referred to as "D.T.," and time and a half will be referred to as "O.T."

QUARTER	YEAR	GENERAL COUNSEL	RESPONDENT	DIFFERENCES (G.C. v. RESP.)
First	1995	$5,880.00[12]	$4,425.38[13]	$1,454.62
Second	1995	7,036.00	5,980.02	$1,055.98
Third	1995	8,269.00	6,230.50	$2,038.50
Fourth	1995	9,632.22[14]	6,684.94[15]	$2,947.28
TOTALS		$30,817.22	$23,320.84	$7,496.38
First	1996	$7,272.00[16]	$6,136.00[17]	$1,136.00
Second	1996	2,767.00[18]	2,803.00[19]	$ -36.00
Third	1996	8,457.00	6,101.12	$2,355.88
Fourth	1996	4,465.56[20]	2,174.78[21]	$2,290.78
TOTALS		$22,961.56	$17,214.90	$5,782.66

Thus, the General Counsel advocates that Fryman is entitled to approximately $53,778.78 in gross backpay.[22] On the other hand, the Respondent asserts that Fryman's gross backpay entitlement is approximately $40,535.74, a difference of $13,243.04.

Breaking out the overtime components of both the specification and the Respondent's answer, we see the following.

QUARTER	YEAR	GENERAL COUNSEL		RESPONDENT		DIFFERENCES (G.C. v. RESP.)
		D.T.	O.T	D.T	O.T.	Double time/Overtime
First	1995	$469.00	/1,290.00	0	/364.57	$1,396.43
Second	1995	298.00	/1,016.00	0	/367.06	$ 946.94
Third	1995	264.00	/2,003.00	0	/377.56	$1,889.94
Fourth	1995	595.00	/2,634.00	0	/2,634.00	$2,851.44
TOTALS		$1,626.00	/6,943.00	$0	/1,486.75	$7,082.25

[12] Includes the $145 lump sum and $200 retirement contribution stipulated by the parties.

[13] Ibid.

[14] Includes $320.22 as the Respondent's 1995 contribution to Fryman's savings plan based on 1995 estimated gross income of $30,997 per year.

[15] Includes $243 as the Respondent's 1995 contribution to Fryman's savings plan as calculated by the Respondent based on $23,147 estimate gross earnings, and a deduction of $304 for disability pay as stipulated by parties.

[16] Includes $304 for 8 days of disability (maternity) pay and $122 for attendance bonus as stipulated by the parties.

[17] Ibid.

[18] Includes $2,394 for disability (maternity) pay and $125 for attendance bonus as stipulated by the parties.

[19] Ibid.

[20] Includes $210.56 as the Respondent's 1996 contribution to Fryman's savings plan based on estimated gross income of $20,053 per year.

[21] Includes $176 as the Respondent's 1996 contribution to Fryman's savings plan as calculated by the Respondent, based on estimated earnings of $16,253.

[22] The amount above reflects, of course, my calculations. The General Counsel asserts that Fryman is entitled to $53,247 in gross backpay. I will operate on the premise that my calculations are correct and will be controlling in terms of the ultimate decision regarding backpay due Fryman.

QUARTER	YEAR	GENERAL COUNSEL	RESPONDENT	DIFFERENCES (G.C. v. RESP.)
D.T. O.T		D.T O.T.	D.T. O.T	Double time/Overtime
First	1996	$477.00/1,313.00	0 /690.29	$1,099.71
Second	1996	14.00 /49.00	0 /21.88	$ 41.12
Third	1996	271.00/2,051.00	0 /500.16	$1,821.84
Fourth	1996	334.00/1,453.00	0/1,453.00	$1,630.70
TOTALS		$1,096.00/4,866.00	$0/1,368.63	$4,593.37

Thus, the General Counsel claims that during the backpay period, Fryman is entitled to $14,531 combined in overtime; the Respondent asserts that for the same period Fryman is entitled to only $2,855.23 — a difference of $11,675.62. Accordingly, regarding the backpay owed Fryman, the parties' respective claims redound to a difference of $1,603.42 between them for all components of the specification except overtime; and a difference of $11,675.62 for overtime.

It should be noted that the gainsharing-payout program and savings plan components of the specification, the calculations for which are also disputed by the Respondent, are both tied to total hours worked (including straight and overtime) by the employee at the Respondent's facility. Therefore, under gainsharing, the individual payout is based on the number of hours she worked, the majority being spent in one department and that department's production and yield records.[23] The General Counsel asserts that Fryman is entitled to $3,592 in gainsharing payout for 1995 and 1996. The Respondent counters and claims that Fryman is entitled to $2,328.70 in gainsharing — a difference of $1,263.30. Similarly, an hourly employee's savings plan benefits at the Respondent are tied to her gross pay in any given year.[24] Clearly then, a resolution of the overtime issue a fortiori resolves in large measure the other disputed components of the specification.

2. The Respondent's alternative approach to Fryman's overtime

As noted, the Respondent offers little or no opposition to the calculations of the specification or to the General Counsel's formula as presented through Sharp, with one exception, that is, overtime.[25] The Respondent's main contention is that the overtime

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[23] The Respondent's Employee Handbook (G.C. Exh. 3) recites at p. 13 (in pertinent part):

> The gainsharing program is based on the principle that as productivity increases in certain areas [of the plant's operations] employees are given a monetary reward for their efforts . . .
>
> * * *
>
> . . . . Hours and Their Effect on Gainsharing
>
> Your individual payout is based on which department you worked a majority of the hours during the quarter. For instance, if 60% of your hours for the quarter were in [the] Ham Boning [Department] and 40% were in [the] Packaging [Department] you will receive a payout based on your total hours worked times the gainsharing payout in the Ham Boning department.

[24] The Fresh Mark Employees Savings Plan allowed the employee to contribute up to 15 percent of her gross pay into the plan. The Respondent would match the first 6 percent of the contribution at the rate of 35 percent. Both the Respondent and the General Counsel basically agree that Fryman historically contributed about 3 percent of her wages to the plan.

[25] The Respondent also objects derivatively to the gainsharing calculation which is based in part on overtime and double time earnings.

calculations in the specification ignores the ''reality'' that the availability (plant-wide) of time and a half overtime and double time diminished substantially during the backpay period and, therefore, Fryman could not have received the overtime attributed to her by the General Counsel's approach and calculations had she actually been working for the Company during the backpay period.

The Respondent called Mark Sullivan, its director of human resources, to explain overtime at the plant during the backpay period and its approach in general regarding Fryman's backpay entitlements.

Sullivan produced copies of the Respondent's payroll data[26] which tend to show that at least as compared to 1994 (1993 records were not produced), plant-wide O.T. and D.T. in 1995 and 1996 were reduced by a significant amount in each category, most notably D.T.[27] Sullivan also testified that in 1995, the Respondent added at least one additional production line to Fryman's department which also reduced the need for O.T. and D.T there. Moreover, Sullivan testified that there was no employee in either Fryman's second-shift microwave department or among similarly senior employees who worked in other departments, who matched the General Counsel's overtime amounts claimed in the specification. On these points, the Respondent produced an exhibit which listed all of the second-shift microwave employees for 1995 and 1996 and their overtime for those years.[28] Additionally, the Respondent produced another exhibit (R. Exh. 5) listing 26 employees with seniority comparable to Fryman and their overtime experience for 1995 and 1996. According to Sullivan, only one of these employees — Marvin Frederick — worked overtime hours comparable to the specification amounts.

Sullivan explained that the Respondent utilized three types of overtime at the plant — daily; weekend; and ''set up.'' Daily and weekend are self-explanatory. Set-up overtime is given to senior employees as part of their regular jobs and may result in regular daily overtime of about 15 minutes to 1/2 hour.

By way of explication of its overtime program in action, Sullivan identified three employees (Richard Bland, Marvin Frederick, and Robert Kramp) as employees with set-up duties. Employees such as these, even in a time of reduced overtime plant-wide, could and did earn substantial overtime but only, according to Sullivan, because of their set-up responsibilities.[29] Sullivan also sought to distinguish overtime availability by department. For

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[26] R. Exhs. 6, 7, and 8 are payroll records taken from the Respondent's master payroll file.

[27] The reductions based on the Respondent's figures were 32 percent for O.T. and 81 percent for D.T. in 1995; and 10.6 percent for O.T. and 52 percent for D.T. in 1996. (R. Br., p. 11.)

[28] See R. Exh. 4. The General Counsel claims that Fryman is entitled to 459.682 O.T. and 88.46 D.T. hours for 1995 and 313.4 O.T. and 53.174 D.T. hours for 1996. None of the employees listed in R. Exh. 4 worked overtime anywhere close to the specification amounts. It is noteworthy, however, that only one of the employees listed in this exhibit had less ''clock seniority'' than Fryman. Based strictly on seniority, none of these employees could have outbid Fryman for overtime either within or without the microwave department.

[29] Marvin Frederick, like Fryman, a second-shift microwave worker with seniority comparable to Fryman, worked 360.75 O.T. and no D.T. in 1995; he worked 440.754 hours of O.T. and 22.25 hours of D.T. in 1996. Fryman did not have regular, daily, set-up O.T. However, it is not disputed that before her discharge, she had a daily assignment of trucking bacon to the coolers, resulting in 15-30 minutes of O.T. daily (like employee Kramp). Fryman

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instance, in departments such as sanitation and smokehouse, employees there do not share overtime with other employees because of the nature of the work.[30] Fryman, therefore, could not get overtime in such departments. In essence, according to Sullivan, in any case where the Respondent's records indicated that employees earned O.T. and D.T. equivalent to or exceeding the amounts claimed for Fryman in the specification, this overtime would not have been available to Fryman because she either lacked seniority, did not have overtime built into her job, was not permitted to work in certain departments (e.g., smokehouse, sanitation, quality assurance), and was a non-salaried worker. [31] On bottom, according to Sullivan, based on the Respondent's reduced plant-wide overtime in 1995 and 1996, any overtime hours due Fryman should be based on the amounts contained in its answer and not the specification amount.

I have carefully considered the Respondent's contentions regarding Fryman's overtime entitlements and, as explained by Sullivan, its rationale is generally reasonable and plausible. However, be that as it may, I am not persuaded that the Respondent's approach to and its calculations of Fryman's overtime should supplant that of the General Counsel. First, the Respondent's claim of significant diminution of plant-wide overtime in the backpay period is based on a comparison of its overtime for only 1 year prior to Fryman's termination in 1994.

By comparison, the specification utilizes a 2-year prior period, that is 1993 and 1994. In my view, the Respondent should have included its 1993 overtime figures to make a better case for comparison with the specification. Having utilized only the 1 year as a baseline, there is a question in my mind as to the effect the 1993 plant-wide overtime figures may have on the Respondent's estimates of overtime due Fryman during the backpay period. Also, it seems that the approach taken by the Respondent, i.e., comparing 1994 to 1995 and 1996, is in itself questionable. For instance, while overtime and double time dipped significantly in 1995 as compared to 1994, overtime and double time dramatically increased in 1996 as compared to 1995. Thus, I cannot conclude with reasonable certainty that Fryman would not have earned overtime equal to the specification's average during 1996 when overtime availability was clearly on the rise.

I also view the Respondent's plant-wide approach to Fryman's overtime as incomplete, if not flawed, because it fails to factor in Fryman's historical penchant for seeking and obtaining available overtime, both in and out of her department. Although the Respondent attempts to distinguish or dispute Fryman's eligibility for overtime vis a vis other employees — which approach I do not find convincing — it is, nonetheless, abundantly clear that overtime was available at the plant during the backpay period. Moreover, it is equally clear that a goodly number of the Respondent's hourly employees earned overtime hours equal to or greater than

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testified that since she returned to work, the Respondent has not given her her previous bacon trucking assignment.

[30] For instance, according to Sullivan, sanitation workers generally work the midnight shift 6 days per week to keep the plant in compliance with the U.S. Department of Agriculture regulations; they are required to work overtime. Smokehouse employees' jobs were not elaborated on by Sullivan.

[31] In this regard, the Charging Party introduced certain exhibits (C.P. 1 and 2) listing a number of the Respondent's employees (purportedly excluding maintenance and clerical employees) who worked more than 300 hours of O.T. and an appreciable amount of D.T. for 1995 and 1996. Sullivan was responding to these documents which, as argued by the Charging Party, suggested that there was ample overtime available to eligible employees during the backpay period.

those included in the specification.[32] Given Fryman's credible testimony and her record for overtime in 1993 and 1994, I am persuaded that she would have been equally assiduous in seeking overtime during the backpay period were she employed at the plant. Significantly, the Respondent offered no credible evidence to refute Fryman's history of overtime work nor her testimony regarding her continued willingness to work overtime in and out of her department.

In my view, based on her seniority, her willingness to volunteer for overtime, and the availability of overtime in substantial numbers during the backpay period, Fryman probably would have been awarded overtime by the Respondent commensurate with the projections of the specification, the Respondent's contentions to the contrary notwithstanding.

In passing, it should be noted that the Respondent has focused on its plant-wide overtime experience at the plant during the backpay period to defeat the General Counsel's approach. However, the Respondent's approach in my view misses the point of the compliance process vis a vis the Board's Order which, on bottom, directs that Fryman be made whole. In that regard, plant-wide overtime experience has relevance for purposes of making the discriminatee whole only if it could be shown that the Respondent offered little or no overtime during the backpay period — that it would have been as a practical matter impossible for Fryman to earn her 1993-1994 average as asserted by the General Counsel. As noted, this could not be shown as the Respondent's own records indicate that it paid about 136,754 O.T. and 13,176 D.T. hours to its hourly workers during the backpay period. It strains credulity to say that Fryman, an overtime "hustler," could not have received approximately 772 O.T. hours and about 141 D.T. hours during this backpay period as claimed by the General Counsel. Thus, even if one were to accept as true the reduced amount of overtime available to employees as a group during the backpay period, it is not at all clear that the reduction would have prevented Fryman, as an individual employee, from earning the amounts asserted by the General Counsel.[33]

This, in turn, leads me to the General Counsel's approach to the overtime issue as presented by Compliance Officer Sharp.

First, I note that Sharp's testimony and her calculations were for all intents and purposes unrefuted. Sharp, in addition, presented herself as a very competent professional who approached the compliance process with an almost clinical objectivity. Notably, she considered evidence from all pertinent sources, giving due weight to the Respondent's position and records. She consulted with discriminatee Fryman for both her input and to ensure her compliance with the mitigation requirement; additionally she contacted Fryman's interim employers for verification. Indicative of the reasonableness and non-arbitrary nature of her approach, Sharp revised her original specification (downward) based on information provided by the Respondent. Thus, on balance, in my view Sharp was fair and equitable in her approach to the make-whole order, and the resulting calculations reflect the rationality and reasonableness of her efforts. I also note that the Respondent, with the exception of its opposition to Sharp's conclusions regarding overtime, does not take the issue with the overall specification as proposed by the General Counsel.

[32] Based on C.P. Exhs. 1 and 2.

[33] Sullivan admitted that some employees routinely sign up for overtime and some never do and, also, that the employee's desire to work overtime is factored in. Sullivan conceded that Fryman regularly volunteered for overtime in the year prior to her discharge.

In my view, the specification, as amended, makes good sense and is entirely reasonable in the overall. The Respondent has not met its burden of showing that the backpay formula is unreasonable and arbitrary. Specifically, I find that the Respondent has not demonstrated that its plant-wide reduction of overtime inn 1995 and 1996 (during the backpay period) would have resulted in a more accurate formula and calculation than that of the General Counsel. Accordingly, I shall use the gross backpay formula described in the specification. Accordingly, I conclude that the amount of gross backpay owned Fryman is $53,778.78.

E. *The Mitigation Issue*

The Respondent contends, in essence, that Fryman did not diligently and in good faith search for work as is required for mitigation of her claim. The Respondent further claims that Fryman searched only a small fraction of the days available during the first 10 months following her discharge, and that she discontinued her job search after she began (what the Respondent describes as) part-time employment with the Union. Accordingly, the Respondent argues that Fryman is not entitled to any backpay.[34]

Barbara Fryman testified about her employment and related activities after her discharge on January 10, 1995.

Fryman prepared and submitted to Sharp, per the compliance officer's request, "Claimant Expenses and Search for Work Reports" (NLRB Form 5224) on a quarterly basis for the backpay period.[35] According to Fryman, these forms accurately set forth her searches for employment and jobs she actually obtained before she was rehired by the Respondent in November 1996. Fryman admitted that for the most part, the jobs she was able to secure were only part-time jobs, especially during the period covering January to October 1995. She also admitted that she quit at least one employer during this period because it only offered part-time hours, and she felt she needed full-time employment.

Fryman was hired by the Union in October 1995 to perform jobsite picketing. The Union would permit her to work no more than 40 hours per week; and she was not allowed to picket in inclement weather and when not working with at least one other picket. Fryman worked for the Union exclusively from October 1995 until she returned to the Respondent in November 18, 1996. Fryman was advised by her physician in August 1995 that she was pregnant and on his instruction stopped all work activity with the Union around March 21, 1996; she delivered her child on May 15 and returned to her picketing duties on June 6. [36]

During the period Fryman was working for the Union, she also worked for a restaurant and a discount department store part-time but quit both jobs at various times because they were not paying enough and required her to work "odd" hours incompatible with her newborn's schedule.

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[34] As an alternative position, the Respondent asserts that Fryman at the least should incur a partial loss of employment for the period October 1995 through November 18, 1996, because she chose to work part-time and abandoned all other work searches to work for the Union. However, the Respondent does not contest the interim earnings nature of Fryman's wages from the Union.

[35] These forms are contained in R. Exh. 1

[36] The specification asserts disability payments rather than full backpay for the period during which Fryman was pregnant.

The Respondent argues in so many words that Fryman did not try hard enough to mitigate her claim; that from January 1995 until October 1995, she looked for work on only 15 percent of the available business days during this time to look for work, and then only worked at low-paying, part-time jobs which she quit at various times because she felt she needed full-time work. According to the Respondent, as further evidence of her lack of diligence and effort, Fryman took an essentially part-time job with the Union, discontinued all further job searches, and generally failed to take advantage of ample opportunity to secure full-time employment.

Regarding the issue of mitigation or a discriminatee's duties to reduce her damages as a result of an unlawful discharge, Board law is instructive as well as well settled.

A discriminatee is obliged to mitigate her backpay claim by searching for and/or obtaining interim employment. Therefore, while required to search for work, the discriminatee need not be successful but must make an honest, good-faith effort to find work. *Lloyd's Ornamental and Steel Fabricators*, 211 NLRB 217 (1974).

The burden is on the employer to show that the discriminatee did not make reasonable efforts to find work. *Thalbo Corp.*, 323 NLRB No. 105 (April 30, 1997); and it does not meet its burden by merely presenting evidence of lack of success in obtaining interim employment or low interim earnings. *The Westin Hotel*, 267 NLRB 244 (1983).

Thus, the employer must affirmatively establish by a preponderance that the employee failed to make reasonable efforts to find interim employment. *December 12, Inc.*, 282 NLRB 475 (1986); *Big Three Industrial Gas*, 263 NLRB 1189 (1982).

In order to show good-faith effort and avoid a finding that she incurred willful loss of earnings, the employee need not spend all of every day searching for employment or even search in each and every quarter of the backpay period. *Cornwell Co.*, 171 NLRB 342, 343 (1968). *Laidlaw Corp.*, 207 NLRB 591, 601 (1973), enfd. 507 F.2d 1381 (7th Cir. 1974), cert. denied 422 U.S. 1042 (1972). Therefore, the entire backpay period must be looked at to determine whether throughout the period there was, in light of all the circumstances, a reasonable continuing search such as to foreclose a finding of willful loss. *Cornwell Co.* at 343. As a practical matter, the employee must only make reasonable efforts to mitigate the loss of income and is not required to undertake the highest standard of diligence. *NLRB v. Ardueni Mfg. Co.*, 395 F.2d 420 (1st Cir. 1968); *NLRB v. Miami Coca Cola Bottling Co.*, 360 F.2d 569 (5th Cir. 1966).

As the Board stated in *Lundy Packing Co.,* 286 NLRB 141, 142 (1987):

> It is well settled that the reasonableness of a discriminatee's efforts to find a job and thereby mitigate loss of income resulting from an unlawful discharge need not comport with the highest standard of diligence, i.e., he or she need not exhaust all possible job leads. Rather, it is sufficient that the discriminatee make a good-faith effort. In determining the reasonableness of this effort, the discriminatee's skills, experience, qualifications, age, and labor conditions in the area are factors to be considered. The existence of job opportunities by no means compels an inference that the discriminatees would have been hired if they had applied. The respondent's obligation to satisfy its affirmative defense is to show a "clearly unjustifiable refusal to take desirable new employment." Uncertainty in such evidence is resolved against the respondent, as the wrongdoer. [Footnotes omitted.]

With the foregoing principles in mind, I am persuaded that during the backpay period, Fryman satisfied her obligation to make a good-faith effort to find and secure employment and that based on the credible evidence of record, the Respondent failed in its burden to prove otherwise. First, Fryman not only testified credibly and candidly about her job searches and employment, she clearly well documented her efforts as she was evidently instructed by the compliance officer. That she mixed up the chronology of some of her jobs, in my view, in no way detracted from the fact and seriousness of her efforts. Secondly, and probably more important, Fryman, from the time she was discharged, diligently attempted to find work and was willing to work jobs that were not comparable to her previous employment with the Respondent. In my view, she clearly did not intentionally seek low paying and menial jobs; however, she took jobs that were offered, jobs that were inconvenient and part-time.

Based on her search-for-work forms, Fryman applied to many different employers. Evidently, the jobs she secured were all that she could get in her area, and she took them when they were not even satisfactory to or befitting of her.

As to the union job, while the Respondent views her employment as a picket as part time, I am not convinced that this is the case. Significantly, the job allowed for 40 hours maximum per week, and Fryman credibly testified that she was always ready, willing, and able to work an 8-hour day and a 40-hour week; however, this was not always possible. The Respondent asserts that Fryman averaged less than 30 hours per week during her employment with the Union. Even assuming this to be true, there is no evidence that by her own actions, e.g., refusing to picket or not showing up for picket duty, Fryman willfully refused to work a full-time job with the Union. As she testified, on occasion she reported for picketing at a jobsite but could not work because of bad weather or an insufficient number of pickets. The Respondent contends that Fryman merely "sat" on lesser paying, part-time jobs, suggesting that she was willfully less than diligent and lacking in good faith regarding her mitigation obligation. On this record, nothing could be further from the truth. Fryman was a worker, a person who cleaned stores and stood on a picket line in bad weather while pregnant, to keep herself employed, something I believe she would have done in any case, the law notwithstanding. Such was her nature and work ethic. I would conclude that Fryman more than satisfied her obligation to reduce her damages and that the Respondent's position on this score is totally without merit.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[37]

[37] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

ORDER

The Respondent, Fresh Mark, Inc., d/b/a Carriage Hill Foods, Salem, Ohio, its officers, agents, successors, and assigns, shall make Barbara Fryman whole by paying her the amount of $49,425.78.[38]

Dated, Washington, D.C. June 30, 1998

Earl E. Shamwell, Jr.
Administrative Law Judge

[38] I have found the specification herein to be a rational, fair, and reasonable approximation of backpay to which Fryman is entitled. However, there may be mathematical or transcription mistakes, either on my part or the compliance officer. For instance, Sharp determined that for the first quarter 1995 based on Fryman's 1993/1994 average, she was entitled to 98.125 units of O.T. average and a 26.75 average in D.T. However, the specification as amended by her indicates that Fryman's O.T. entitlement is based on 87.55 units of O.T. and 23.87 units of D.T. For the first quarter 1995. Significantly, G.C. Exh. 4, Fryman's 1993 and 1994 earnings records, indicates that the 1995 first quarter average for purposes of the specification should be 98.125 and 26.75 for O.T. and D.T., respectively. I would recommend as part of this Order that any purely mathematically or clerical errors contained in the specification be automatically corrected without further order or action by me.